

CENTER FOR INSTITUTIONAL REFORM AND THE INFORMAL SECTOR

University of Maryland at College Park

Center Office: IRIS Center, 2105 Morrill Hall, College Park, MD 20742
Telephone (301) 405-3110 • Fax (301) 405-3020

THE TRANSITION TO REPUBLICAN GOVERNMENT

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**Stephen L. Elkin and Jyl Josephson
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Author: Stephen Elkin and Jyl Josephson, both University of Maryland

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Democratic republics are founded on the idea that the people must rule. But of central concern to the founding and maintenance of such republics is the manner in which the people accomplish self-rule. Not all popular regimes are equally attractive or workable. That there will be popular regimes is essentially settled, at least in places shaped by Western political thought. But how to create popular regimes in which there is popular rule of an attractive kind is a much more difficult problem.

If a democratic republic is thus a regime of limited powers, in what does limitation consist? A common answer refers to external, transcendent standards that are to bind law-making. In particular, theorists of democratic republics have asserted the necessity of some line between the public and private sphere, which is to stem from these standards. The people are to act in "public" matters, and politics is not to reach into the private sphere.

For some theorists, the private domain is given its separate status because it embodies and allows the exercise of moral principles: for example, rights to one's own body and the fruits of its labor, or the rational unfolding of certain principles of a transpolitical law. In other formulations, the private domain is seen as instrumentally superior -- as, in one version, more efficient.

Such views, however, have been subject to criticism. A variety of theorists have argued that there are no such external or transpolitical standards that provide the boundaries for political choice in democratic republics. By and large these criticisms are telling: it is difficult to defend the idea of standards based on transpolitical values or instrumental superiority to demarcate the reach of public authority.

Thus, democratic republics stand or fall on the ability of the people to limit themselves. At least analytically, there are two parts to such a problem. The first involves the creation of a stable form of popular rule, i.e. one in which the people have significant control over those they choose to rule them, and in which there is no regular resort to violence involving people and rulers. The second concerns the creation of the means to limit that rule, the problem of self-limitation itself. There must first be popular rule before the question of limiting it can arise.

The creation of popular rule begins with the emergence of a public sphere, a domain in which public matters can be publicly discussed. Next comes the creation of a set of institutions through

which the governed can control their governors. Here are the usual devices: electoral systems, political parties, a free press etc. Crucial to the success of such a process is the civilian control of the means of violence. But that is insufficient: crucial to controlling the use of violence is the ability of political leaders to control one another.

As for limiting the popular rule that is created from such institutional arrangements, in one version of the problem, the fundamental question is what is the meaning of the rule of law when external standards are an insufficient guide to the content of that law. This is essentially a problem of the content of practical reasoning and how its exercise may best be institutionalized in the search for justifiable limits.

"If men [sic] were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

James Madison, The Federalist Papers, No. 51

"..the authors of the American Constitution...did not fall into the error of supposing that the unorganized populace *knew how* to rule. They had recognized that the populace had the *power* to rule. They had acknowledged that it had the *right* to rule. They then knew that the problem was to *enable* the populace to rule."

Walter Lippmann, The Good Society¹

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¹Boston: Little, Brown, 1937, pp.249-250.

²This paper is a substantially revised version of Stephen L. Elkin, "The Transition to Republican Rule", International Political Science Association, Buenos Aires, 1991.

Democratic republics are founded on the notion that the people must rule. But of central concern to the founding and maintenance of such republics is the manner in which the people accomplish self-rule. Not all popular regimes are equally attractive or workable. That there will be popular regimes is essentially settled, at least in places shaped by Western political thought. But how to create popular regimes in which there is popular rule of an attractive kind is a much more difficult problem.

Democratic republics are best understood as popular regimes, where the rule of the people is limited. Popular control of authority provides no warrant for the people to do as they please: it is not open to democratic republics to pursue any purpose in any way. The notion of limits on the people's rule is based upon the proposition that the people can be tyrants just as much as monarchs: tyranny does not come only in the form of one or a few tyrants. As Jefferson said:

173 despots would surely be as oppressive as one...An elective despotism was not the government we fought for.³

Failing to provide limits on what the people can do through their rule invites arbitrariness: without some notion of limits all actions or purposes might be counted as legitimate, including actions which would widely be counted by the people themselves as arbitrary.

Much discussion of popular rule proceeds as if it does not

³Notes on Virginia ed. William Peden (Chapel Hill, 1955), p. 120.

much matter what form government action takes. That is, as long as the governors are adequately controlled by the governed it does not matter what the government does. Government action then need only reflect popular will: the people, after all, are sovereign. But this is a grievous error: some forms of popular rule and consequent government action may be arbitrary and thus subversive of popular sovereignty itself, as arbitrariness deteriorates into civil conflict and tyranny. This problem has come to be understood, at least in the Anglo-American world, as the question of the rule of law. Thus the essential problem to be solved is not just that the people rule by being able to control their governors, but that their governors, acting at their behest, must rule according to law. Constituting a regime of laws, not of men and women, is the manner in which limited rule is established and maintained. The problem, as Lippmann said, is to "enable the populace to rule".

I.

If republican government is thus a problem of limiting the exercise of power, in what does limitation consist? Otherwise said, what shall be the content of the law? Hendrik Hartog characterizes a common answer:

In most versions, the idea of a government of laws has been said to lead to a vision of limited government. Government is legitimate only so long as it recognizes that there are things that it cannot do...At the same time, the notion of a government of laws has suggested a government that must justify itself by its congruence

with external standards and norms.⁴

Hartog's reference to external standards suggests how the problem of limits on popular rule has usually been handled--by reference to a set of external, transcendent standards which are to act as injunctions prohibiting what the people may do. In particular, theorists of democratic republics have asserted the necessity for some line between the public and the private sphere, which is said to stem from such external standards. This line of demarcation, drawn for various purposes, is then enforced in the laws of the regime. The people are to act in "public" matters, and politics is not to reach into the private sphere. Law is held to be neutral, and is utilized to maintain the separation between private and public. The distinction between public and private is then crucial for republican rule of law, and the private is held to be inviolate.

For some theorists, the private domain is given its separate and preeminent status because it embodies and allows the exercise of moral principles: for example rights to one's own body and the fruits of its labor, or the rational unfolding of certain principles of a transpolitical law. In other formulations, the private domain--of markets, property, and civic associations--is seen as instrumentally superior, or, perhaps, more efficient. In this version no moral principles are invoked--at least not directly--but behind the instrumentalist or efficiency claim is a

⁴"The Constitution of Aspiration and 'The Rights that Belong to Us All'", Journal of American History, Dec. 1987 (74)3, 1013-34, p. 1034.

strong moral claim about what is to count politically.

Such views have, however, been subject to criticism from a wide range of disciplines and a broad array of points on the political spectrum. A variety of theorists have argued that there are no such external or transpolitical standards which provide the boundaries for political choice in republican regimes.

Legal realists were perhaps the first to enter the discussion of the public-private distinction in the twentieth century, arguing that law is not externally given, but is, rather, what judges say it is. Any attempt to show that the law has some "logic"--that it is the unfolding of legal principles--must fail.⁵ The corollary for legal realists then was that, far from being neutral, the law, at least as judges elaborated it, favored the already powerful.⁶

Once the case is made that law is not the neutral arbiter of the public-private distinction, the various means of demarcating a 'natural' private sphere--via private property, markets, economics, or the family--are also open to question. It has become increasingly clear that property, whatever it once was, is now a product of choices made by the state.⁷ Property then can hardly

⁵See Frank Michelman, "Possession vs. Distribution in the Constitutional Idea of Property", 72 Iowa Law Review 1319-50 (1987), and also Richard Posner, The Problems of Jurisprudence, (Cambridge:Harvard, 1990) esp. chapter 1.

⁶The Critical Legal Studies movement is a recent manifestation of similar claims, albeit they are made for different purposes.

⁷See Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism, (Chicago, 1990); Frank Michelman, "Law's Republic", Yale Law Journal 97:8 (July 1988) 1493-1537; and Robert Dahl, A Preface to Economic Democracy (University of

serve as an externally given source for delimiting the state's sphere of activity, and the claims for the sanctity of property cannot rest on principles that are supposed to transcend politics.⁸ Much the same conclusion emerges from the rise of the welfare state where large scale distributional effects are intended by the law-- in effect taking the revenue from the property of some to increase the income of others.⁹

Recent feminist political and legal theory also makes it clear that law has always significantly shaped the private sphere, gender relations, and especially family life. Feminist theorists have thus argued that the demarcations the law enforces cannot be neutral or indeed easy to justify by reference to a consistent set of principles.¹⁰ As Susan Moller Okin says, given a gendered division of labor:

Public life is far less distinct from personal and domestic life for women than for men. Their experience in each radically affects their possibilities in the

California, 1985).

⁸Although it is certainly the case that a property regime could serve to limit some types of state power; the point is that the formulation of a 'property regime' is a matter of political and institutional **choice**, not externally given.

⁹This is the effect regardless of the stated or underlying political rationale for welfare state functions.

¹⁰Recent works on feminism and the law include Joan Hoff, Law, Gender, and Injustice: A Legal History of US Women (New York:New York University Press, 1991), Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell, 1990). For a brief treatment of the reach of law into families in 19th century America, see Hendrik Hartog, "Mrs. Packard on Dependency", *Yale Journal of Law and the Humanities* 1:1 (1988) pp.79-103. In general, see Mary Ann Glendon, The Transformation of Family Law (Chicago:University of Chicago, 1989).

other. The claim that the two spheres are separate is premised upon, but does not recognize, both a material and a psychological division of labor between the sexes.¹¹

And from a wholly different quarter radical economists have demonstrated that the public-private distinction, at least as it purports to define the private domain of economics and the public domain of politics, rests on the proposition of labor asset neutrality. This distinction assumes that it is simply adventitious that capital hires labor. If efficiency is the sole organizing standard of economics, it could easily be the other way around: if it were more efficient, labor would hire capital. But this crucial proposition is precisely what cannot be sustained since labor is unlike any other commodity in that it cannot be separated from the person providing it. Labor therefore requires 'disciplining' in a way other commodities do not, and therefore the buying and selling of it is a deeply political matter.¹²

Even more modest claims that do not rest the distinction between public and private on transcendent standards cannot be sustained. Take, for example, the claim that the separation between politics and markets can be anchored in a concern for social efficiency. From various quarters have come arguments that social efficiency can have very little concrete meaning in the context of actual choices in complex societies, since it rests on

¹¹"Humanist Liberalism", in Liberalism and the Moral Life (Harvard, 1989) p. 43.

¹²For one discussion of the way in which labor is not a commodity, see Samuel Bowles and Herbert Gintis, Democracy and Capitalism, ch. 3 (Basic, 1986).

propositions of welfare economics that cannot be sustained. Further, theorists ask why it should be assumed that efficiency is the primary value in social life.¹³

And, echoing arguments made above, they in any case say that markets are political creations. They are "regimes of contract"¹⁴ not some autonomous entity subject to their own laws of activity. They could neither exist nor work without politics, and thus they can hardly be superior to political life in their socially desirable properties.

Perhaps the ultimate criticism of the public-private distinction and the claim that the private is superior to the political comes from theorists like Benjamin Barber. Such theorists argue that politics is the form of social existence because it is only in political life that we can properly face the existential fact that there are no independent grounds for choice, yet we are dependent on one another, and we must act. Politics is a form of "public seeing" that must replace efforts to anchor political choice and the whole apparatus of the public-private distinction in metaphysics. No such metaphysical basis for the proper organization of politics and society exist, and so politics properly understood and organized is, as Aristotle contended, truly

¹³See Stephen Elkin, "Economic and Political Rationality" Polity 18(2), Winter 1985, and B. Williams and J. J. Smart, Utilitarianism: For and Against, (Cambridge, U.K.:Cambridge University Press, 1973).

¹⁴Roberto Unger, "The Critical Legal Studies Movement", Harvard Law Review.

the Queen of sciences.¹⁵

The above critiques of the public-private distinction argue that, in the effort to constrain the demos--to restrain the exercise of popular sovereignty so that it does not lapse into arbitrariness--politics cannot be made to stop at the water's edge of neutral law sustaining a private sphere. There can be no escape into economics, property, the family, or markets. Each is 'contaminated' by politics, and the principles of law or morality that are said to secure them against the invasion of politics are difficult to sustain. To insist that legal and economic theory provides objective grounds for why, how, and where politics is to be restrained via law is to invite incoherence, and lead to the collapse of the whole effort to prevent popular government from lapsing into tyranny.

II.

If the critique of external, transcendent standards is accepted, then republican regimes stand or fall on the ability of the people to limit themselves. Where then can republican citizens turn in the effort to insure that popular rule does not simply take over where tyrannies of the one and the few have left off? Republican rule must be limited: a popular regime must still be a

¹⁵In addition to Barber, Strong Democracy, (Berkeley:University of California, 1984), see among others Ronald Beiner, Political Judgment (Chicago:University of Chicago, 1983), Bernard Crick, In Defence of Politics, (Chicago:University of Chicago, 1972). In this context, it is also worth considering Michael Oakeshott. See especially his On Human Conduct, (Oxford:Clarendon, 1975).

regime of laws. How are the limits to be established, the laws given content, if there are no transcendent standards to offer guidance? Without external standards as the basis for limits on the citizens of the republic, the foundation of a republican regime must be a self-limiting popular sovereign.

Finding a basis for self-limitation need not be as great a problem as it first appears, for the people acting through their representatives are not without guidance. The history of popular government provides some practical knowledge of how to limit the people's rule. While metaphysics may not vouchsafe knowledge, reflection on republican political practice can. Some ways in which the people might rule simply will not work, since sooner or later they will undercut the very qualities of the regime which secure that rule. For example, emptying the treasury to provide benefactions for the mass of citizens will lead not only to economic chaos but, very likely, also to civil strife and subsequently to the overturning of popular rule. In much the same way, there is some practical knowledge about what limits will actually work and how they may be made to work: there is much historical experience that suggests that some combination of private property and the division of governmental powers is effective in preventing unlimited rule.

What such considerations point to is the use of reason as pragmatists understand it.¹⁶ The question of whether limitation on

¹⁶For a fuller account, and for the arguments about whether pragmatism rests on some strong claims about how the world works and may be made to work, see Donald Herzog, Without Foundations,

rule is itself justified is not separable from how and whether it can be accomplished. Thus, there are not three separate questions: what are the appropriate limits on the people's rule, how are these limits justified; and how can limitation be made to work? The answer to each question depends upon the answer to the others. Starting from the premise that some limit on the people's rule is necessary--if only because such rule cannot survive without limits--the process is one of considering specific limits on rule, investigating how they might be accomplished, and deciding upon a reasonable set of limits in light of what is necessary to achieve them.

The means of limiting popular rule can thus be settled through a process of reasoning where those advocating specific limits marshal arguments and adduce evidence for their positions, and respond to criticism. What drives the process is not a commitment to a specific set of values but instead to the value of reasoning and what it says about how the world may be made to work. And it is from the mix of reasoning tested against what works or seems likely to work that an understanding of the value of republican government can grow. Creating a limited popular regime in this pragmatic view does not consist of divining transcendent values and trying to implement them. If anything the process is the reverse: what is valuable emerges from a tentative, conditional commitment

(Ithaca: Cornell, 1985), Richard Rorty, Philosophy and the Mirror of Nature, (Princeton: Princeton University Press, 1979), and Charles Anderson, Pragmatic Liberalism, (Chicago: University of Chicago Press, 1990).

to republican rule, and its full value only emerges in the process of trying to bring it to fruition. It is then through the exercise of popular rule itself--as an exercise in collective reasoning--that both the full value of limitation and its specifics emerges: limitation is self-limitation.

Now it may seem that this is not much to go on, that limitation of popular rule cannot succeed if it is only to be guided by such pragmatic, conditionally normative reasoning. However, it is very likely the case that the problem of giving content to the law will look much the same even if it is thought that there are transcendent standards. Given the long-standing and deeply contested effort to identify and give content to transcendent limits, it is unlikely that anything specific enough to guide practice is available.¹⁷ Thus, even if transcendent standards can be convincingly demonstrated, they will end up playing the same role as the pragmatist's commitment to limiting popular rule on the basis that it is unlikely to work any other way. Both are starting points--and their value can only emerge out of the process of trying to give them concrete meaning. In short, in both cases the real work is done by the exercise of pragmatic reason. Further, it is far from clear that the sense of how valuable republican rule is will be any stronger among those who rest their case on philosophy than it will be among those for whom its value emerges out of a consideration of what it takes in the world to limit popular rule.

¹⁷See Judith Shklar, Legalism, (Cambridge:Harvard, 1964).

It is still the case then that even if there are transcendent standards republican rule will nevertheless depend on self-limitation. The burden will remain very much on the people and their representatives to give content to the limits of their own rule. This in itself is an important point. But for our purposes here it is the corollary of this conclusion that is crucial: the institutions of republican rule will need to look much the same whether there are or are not transcendent standards to limit the people's rule. The existence of such standards does not point to some specific institutional design, simply because the content of such standards is likely to be so diffuse as to leave the burden pretty much where pragmatists think it is: with the conviction of the people and their representatives that a certain set of limits on their rule are necessary, valuable, and possible.

Thus the central problem of republican government is to create a self-limiting popular sovereign, capable of pragmatic conditional reasoning. It is an exercise in institutional design, not in political philosophy: the problem is one of creating and maintaining a regime composed of at least some institutions able to reason about appropriate limits which, expressed in law, will give content to self-limitation. This puts the burden of achieving non-arbitrary rule where it belongs: on the people, since no other force is capable of restraining them if they are disinclined to accept limits. And it makes knowledge of how to constitute a self-limiting popular sovereign the most important thing for friends of republican government to know. They must have a theory

of the political constitution of such a regime; i.e. a set of propositions that indicate how a self-limiting popular sovereign must work and how it may be reached.

III.

The central question for the constitution of a republican regime is then the practical one of how to create a self-limiting popular sovereign. There are a number of steps in doing so, not all of which can be discussed here. At least analytically, however, there are two parts to the exercise.¹⁸ The first part involves the creation of a stable form of popular rule, i.e. one in which the people have significant control over their rulers and there is no regular resort to violence involving both people and rulers. The second part concerns the creation of the means to limit that rule: the problem of self-limitation itself. There must be a 'people' able to rule before there can be efforts to limit that rule.¹⁹

¹⁸We say 'analytically' in order to emphasize that the 'parts' probably occur together in practice. This is also likely to be the case with the different steps within each part that we outline below.

¹⁹The contemporary effort to move from state socialism to some form of market-based democracy can be seen as a special instance of the general problem of the creation of democratic republics: how to constitute a regime which is self-limiting. Aside from the usual complexities of constituting republican regimes, transitional republics have special difficulties stemming from the flaws of state socialism: state socialist regimes were powerful, arbitrary, and ineffective. These regimes were in many senses the antithesis of regimes characterized by the rule of law. The changes required are then not merely economic, nor political, nor social. They are constitutional: the new regimes must accomplish changes in all these dimensions.

If the recent (1989-1991) experience of Eastern Europe and China is any guide, the creation of a regime built around popular rule begins with the emergence of a republican citizenry and of its corollary, a *res publica* or public sphere. The birth of a republican citizenry is not only the first, but probably, the easiest step: it is politics at its best. People try, often for the first time, to articulate their hopes for themselves and their compatriots. People who have felt themselves less than fully human, trapped in an enclosure of private lies and public silence, cut off from any discussion of political life, are suddenly free to talk about events which profoundly shape their lives. And it is the talking that is so striking: the exhilaration of arguing about their common life in a context in which the arguments can matter, in which the talking can shape their shared destiny. This talking is accompanied by a hunger for information. Everywhere one goes there is a hunger for news. Newspapers are snatched up, broadsheets are printed, posters appear all over.²⁰

The crucial first steps in creating a republican citizenry are thus unmistakable: the outpouring of words, the hunger for information. There is no citizenship without public speech. Once public speech becomes possible, then it is in the exchange of information and argument that the citizenry is born. The insistent question out of which the birth occurs is: what is going on and what can we do about it?

²⁰This characterization is based on first-hand observation by Elkin in Beijing May-June 1989 and on several occasions in Warsaw during 1990 and 1991.

Out of such public talk may come the next step in the creation of a republican citizenry: the appearance of a *res publica*. Public speech creates and reinforces the sense that there are public matters, not just private concerns. Government thus cannot be private because it involves all of the people; politics is not a private matter. The sense grows that there are matters which are the concern of the people: a public sphere to which a people's government must attend.

All of this seems almost natural--and perhaps it is. After all, Aristotle said that humans are political beings. People appear to need little instruction regarding public speech: they may be confused about the details of what popular rule entails, but not about what follows from and is the basis for public action: the need for rights of assembly and speech.

The next step in the creation of a republican regime is the construction of a way the people can rule. A set of institutions must be created that can rule in the name of the people and give expression to their views on public matters. These consist of the usual list of devices by which the governed can control their governors so that policy may reflect popular will: electoral controls; political parties; a free press; an array of organizations capable of lobbying activity, etc. However, for any of these institutional devices to actually work as a means of popular control of authority, the use of violence to settle political disputes must be curbed and, equally important, the means of violence must be in civilian hands.

The civilian control of the means of violence is the foundation upon which everything else rests. If the means of violence are not in civilian hands, the regime is a military dictatorship or some other non-republican, non-popular form of rule. The devices for placing the means of violence in civilian control are well-known. First, the means of violence can be dispersed between the army, militia, and police; providing for civilian oversight of the military and protecting the civilian right to bear arms are corollaries to this device.²¹ Second, to prevent the officer corps from being insulated from the larger society, recruitment of officers must be from a wide range of ordinary citizens; the corps should not be the special preserve of a caste or class. Finally, members of the army, militia and police must be indoctrinated into civilian norms.²²

Perhaps less well understood as a means of controlling the use of violence is the importance of rulers controlling one another. Most attention regarding the control of violence in republican regimes has been given to the problem of the people controlling the powerful. This is a principal theme of constitutionalism. Less attention is paid to the problem of the powerful controlling one

²¹This need not mean a right to the kind of massively destructive weaponry available on the streets of any major city in the United States. In fact, the existence of the means of violence concentrated in the hands of a few self-selected persons constitutes the very kind of arbitrary possession of the means of violence which makes republican rule impossible.

²²One discussion of how this sort of indoctrination may occur--and of the public costs when it fails to occur--is in William Ker Muir, Jr. Police: Streetcorner Politicians, (Chicago:University of Chicago Press, 1977).

another. This is likely the principal institutional means by which the use of violence is controlled in a republican regime. Its importance may be seen by asking: once the means of violence are in civilian hands, what is to prevent civilian leaders from using them--in a civil war or a civilian-led revolution?

The control of violence in a republican regime thus also depends on the establishment of institutions of mutual control among leaders so that some are not tempted to use state power to subvert popular government. But consensus among leaders of popular government on the institutional rules of the game is problematic: what we need to understand is how this consensus develops, or better yet how 'conventions' of popular rule arise among leaders.

In one version this is essentially the problem of avoiding permanent revolution: preventing successive sets of state officials from using state power to remake society, since constant remaking will induce civil strife. The problem is extraordinarily difficult to solve, as may be seen by contemplating what the new people's government must decide. For example, these new republics must decide who has title to productive assets, the rules by which public officials will act, and where the public/private line is to be drawn. Decisions regarding title to productive assets, the rules of public office, and the line between public and private will determine the life-chances of the mass of citizens, and with it who will be rich and powerful in the new regime. The temptations for the ambitious, the greedy, and the merely concerned

to engage in conflict are large indeed.

There are at least two ways of defusing such conflicts: relying on elite conventions that evolve over time, as is the case in Great Britain, or holding a constitutional convention that sets out the rules, as in the United States. In the American-style case, a constitution is authorized by "we the people" through a special convention held for the purposes of designing the constitution, and through special processes for its approval. The establishment of a constitution in this sense offers a set of rules for the resolution of conflict, and thus a natural point of agreement: a prominent alternative. The existence of something on the table--the prominent alternative--provides a ready-made answer to such practical problems as limiting state power and establishing title to productive assets. It helps elites to solve problems that they could not easily solve for themselves.

Thus, although leaders indeed do and will have deep disagreements, they also share something, viz. the prospect that prolonged conflict may well leave them, as well as their supporters, worse-off. Still, agreement is difficult and costly, since for each to trust the others and be mistaken will have large and serious consequences. The problem is how to avoid the prolonged conflict that can easily grow out of such mistrust. One way to proceed is to have a constitutional convention where the pressure is on because the citizenry is expectant that something will be produced. So something is produced: some set of rules. Leaders may not take this set of rules seriously, since it is only

a piece of paper that can of course be violated at any later date. Yet several things are now true: the very existence of a set of rules makes it a prominent alternative.

This may even be the case where the people have not blessed the set of rules by their votes, although such popular endorsement may enhance their legitimacy. The recent coup attempt in the Soviet Union neatly makes the point. The very existence of a constitution, despite the fact that it certainly was not the result of any general vote or any other obviously legitimating process, provided a basis for opposing the coup. Thus, Boris Yelstin characterized the coup as "anti-constitutional", as "unlawful", and called for a "return of the country to normal constitutional development".²³ The existence of the constitution provided a basis for opposition, and apparently was one of the grounds on which the decision was made by the military not to unleash the means of violence against the people.

This view of constitutional conventions as providing a prominent alternative rests on the point that some set of rules is better than no rules at all for those concerned. It matters less what those rules are than that they exist. Of course leaders and their followers are differentially affected by different sets of rules. Constitution-making may then not only have elements of a coordination game,²⁴ but also elements of prisoner's dilemma and

²³Remarks made in Moscow on August 19, 1991, as reported in the New York Times, August 20, 1991.

²⁴See Russell Hardin, "Why a Constitution?", manuscript, 1987, for a description of constitutionalism as a coordination game.

other strategic games. But, regardless of the situation prior to the establishment of rules, once a prominent alternative is established, the costs of overturning it--with the prospect of being worse off--come into play. This is compounded by the fact that some authorities will act to enforce the constitution once it is established and thus the potential costs of detected defection will rise.²⁵

The second manner of resolving conflict among elites is the English way of proceeding: an agreement that evolves, with a set of conventions that are established one at a time. A set of rules is then established as a matter of 'elite convenience'. Conflicts are settled, creating solutions that are too costly for the losers to overturn, and thus the settling of conflicts produces a set of conventions. In this way permanent revolution is avoided by a long process where conventions grow up that are convenient for leaders to adhere to. This 'long march' approach simply does piecemeal what the constitutional convention method does all at once: create a series of prominent alternatives for the solution of conflict.

Finally we arrive at the problem of self-limitation itself. For the people to rule in a way that is self-limiting, they must rule according to law. We have argued that republican law cannot

²⁵Of course, if constitution-making is in effect simply a coordination game--for example, it is written in an 'era of good feeling' immediately after a revolution--it may serve as an easy point of agreement. Unraveling such an original agreement will typically be simply too costly even as the disadvantages of the initial agreement come to light.

be a simple expression of transcendent standards. But neither can it be a set of commands: if law is merely command, then the people have simply replaced the tyrant. Why would an elective despotism be preferable to any other sort of despotism? As J.S. Mill said:

"The 'people' who exercise the power are not always the same people with those over whom it is exercised.." ²⁶

i.e., the rule of the people is really the rule of some people over others. Republican rule of law, we have said, can be understood as the product of pragmatic reason. In this sense, then, republican law need not be arbitrary, and the central problem of republican government is the creation of institutions capable of exercising pragmatic reasoning.

One approach to the problem of the rule of law that historically has been taken--notably in the United States--is to distinguish between fundamental law and statute law. In this approach, the people are to rule, but it is best for the flourishing of that rule if they cannot through ordinary legislation easily change the basic law. The crucial republican institution is a Supreme Court that exercises judicial custodianship of the fundamental law. In effect the people authorize a special institution to give force to a body of principles that are to limit what they may do through ordinary legislation.

But recent experience suggests that such an institutional design has difficulties. As statute law visibly expands, it

²⁶In On Liberty, edited with an introduction by Gertrude Himmelfarb (New York: Penguin, 1974), p. 62.

becomes more difficult to maintain judicial custodianship, as American experience suggests.²⁷ And what the Supreme Court does is no longer understood as essentially amending the common law as it has found expression in the fundamental law of the Constitution. With the expansion of ordinary law-making, citizens see state authority in the service of large-scale social change, and they become attuned to worrying about these changes. These habits of worry spill over to scrutiny of the Supreme Court; citizens sense that there is something wrong with the manner in which the Court is functioning.

For it is now apparent that the Court is acting much like a legislature. And the distinction between statute law and fundamental law is being eroded as the Court comes to be seen as just another legislative body. The Court in the American-style case is designed to be a kind of 'common law legislature',²⁸ but this is a tricky hybrid, difficult to sustain. And when the Court comes to be seen simply as a legislature dressed up as a Court, then the idea of self-limitation has collapsed: the distinction between fundamental and statute law has broken down. Thus, what seems like a promising way to give institutional form to the idea of self-limitation--by focusing on a distinction between statute and fundamental law--is not easy to sustain in an era of

²⁷One discussion of the complexity of this problem is Richard Stewart, "The Reformation of American Administrative Law", Harvard Law Review, Vol 88 No 8, (June 1975) pp.1667-1813.

²⁸See Friedrich A. Hayek, Law, Legislation, Liberty, Volume I, "Rules and Order", (Chicago:University of Chicago, 1973).

substantial state activity.

There is an alternative path to giving institutional content to a popular regime built around a self-limiting popular sovereign. This might be called the political party solution. In this path, parties present programs as a product of reasoned internal debate. The political program that results is then criticized by opposition parties through reasoned external debate. The key to this version of the rule of law is not a Supreme Court but the internal organization of political parties and the quality of party leadership. This sort of regime relies on elite forbearance: elites do not use the vehicle of ordinary law-making to make great changes except after careful and extensive consultation. But here again there are obvious sorts of difficulties. Recent experience in Britain, with the curtailing of civil liberties under governments led by Mrs. Thatcher, suggests how elite forbearance might break down.

The basic point is that neither of these institutional paths--elite forbearance, or a Supreme Court--seem workable over time. The reason perhaps is that too much weight is put on them, i.e. neither can do the job alone. If this is so then there is a need to reformulate the theory of the political constitution of republican government. Other ways must be considered to give institutional substance to self-limitation as it is expressed in the rule of law. And the manner of joining the various devices together in a workable whole must also be examined.

IV.

Even when institutional forms for the expression of popular rule and of self-limitation are established, there remains a further question--the problem of effectiveness. As Stephen Holmes has pointed out, the concerns of the American founders were not only with limiting the possibility of tyranny, but with creating an effective regime, based upon their "frustration with the weakness of central government" under the Articles of Confederation.²⁹ The theory of the political constitution of a republican regime must concern itself not only with establishing institutions of self-limitation, but also with the effective use of political power. This is Madison's concern in Federalist 51: constituting a regime that is effective, and that can limit the people and itself. Putting into practice the constitution of a self-limiting, effective popular regime is the essence of republican government.

²⁹"The Liberal Idea", The American Prospect, No. 7, Fall 1991, pp. 81-96; p. 87